Date: December 8, 1997

Case No.: 96-INA-00236

In the Matter of:

FAT ALBERT WAREHOUSE, INC.,
Employer

On Behalf Of:

CARLOS BOCANEGRA,
Alien

Appearance: Marsha Edelman, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 17, 1994, Fat Albert Warehouse, Inc. ("Employer") filed an application for labor certification to enable Carlos Bocanegra ("Alien") to fill the position of Assistant Manager (AF 10-11). The job duties for the position are:

> Assist manager in management of retail store. Train and supervise clerks and stockhelp [sic], assign tasks to employees, prepare work schedules, take inventory, handle customer complaints. Responsible for entire health and beauty department.

The requirements for the position are two years of experience in the job offered. In addition, the Employer is requiring that applicants be fluent in Spanish and available to work on weekends.

The CO issued a Notice of Findings on October 18, 1995 (AF 61-64), proposing to deny certification on the grounds that the Employer failed to establish that it rejected four U.S. applicants solely for lawful, job-related reasons. In addition, the CO noted that the Employer appears to be requiring applicants to have experience in each listed job duty. Accordingly, the CO found this requirement to be unduly restrictive and instructed the Employer to document the business necessity of the requirement.

Accordingly, the Employer was notified that it had until November 22, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated November 21, 1995 (AF 65-82), the Employer contended that all four U.S. workers were interviewed over the telephone. He stated that two of the applicants questioned by the CO stated that they could not work for the offered salary and the remaining two applicants did not possess the requisite experience. In addition, Employer's Counsel argued that an applicant who meets the minimum specified requirements may still be rejected by the employer if the applicant is unable to perform the main job duties required for the position. Finally, the Employer stated that an assistant manager who is unfamiliar with health and beauty products and retail management is unable to perform duties required of the position.

The CO issued the Final Determination on November 28, 1995 (AF 83-85), denying certification because the Employer failed to establish that he engaged in a good-faith recruitment

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

effort. Specifically, the CO found that the Employer failed to establish that four U.S. applicants were rejected solely for lawful, job-related reasons.

On December 21, 1995, the Employer requested review of the Denial of Labor Certification (AF 86-97). The CO denied reconsideration on February 27, 1996, and forwarded the record to this Board of Alien Labor Certification Appeals on March 14, 1996 ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the CO questioned the Employer's recruitment efforts with regard to four applicants, Mr. Rodriguez, Mr. Fernandez, Mr. Pizzchemi and Mr. Cotto (AF 61-62). In his recruitment report, the Employer indicated that Mr. Rodriguez and Mr. Fernandez were not willing to work for the salary offered (AF 55). The Employer further indicated that Mr. Pizzchemi was rejected because he wants medical benefits, he does not have experience managing a health and beauty department, and he is not fluent in Spanish (AF 54). Regarding Mr. Cotto, the Employer stated that he has no experience managing a health and beauty department in a large retail store (AF 54). However, in response to questionnaires sent by the New York Department of Labor, Messrs. Fernandez and Pizzchemi indicated that they were not contacted by the Employer (AF 39, 46). Similarly, Messrs. Rodriguez and Cotto indicated that the Employer telephoned them, but they were not interviewed (AF 30, 50). Therefore, the CO, in the NOF, requested that the Employer clarify his recruitment process and document all contact with the applicants (AF 61). Specifically, the CO instructed the Employer to indicate the date and type of contact, to submit copies of all letters sent to the applicants and to further document the lawful, job-related reasons for rejecting the applicants.

In rebuttal, the Employer stated that he personally interviewed each of the four named applicants over the telephone within two weeks of receiving their resumes (AF 76). The Employer reiterated that two of the applicants were not willing to work for the salary offered and the remaining two applicants were unable to perform the requisite job duties. The Employer explained that he used a list of questions to interview each applicant over the telephone and attached the questions allegedly used to interview each of the four applicants (AF 70-73).

Where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to the applicant's statements. *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989); *Jersey*

Welding & Fence Co., 93-INA-43 (Oct. 13, 1993). As noted above, two U.S. workers in this case independently stated that they were never contacted by the Employer. Likewise, the remaining two U.S. applicants independently stated that, although they were telephoned, they were never interviewed. Furthermore, we find it suspect that the Employer is unable to provide any record (*i.e.*, a telephone bill) of his telephone calls to the applicants. Moreover, we find it odd that the Employer made no mention of his list of interview questions until the rebuttal. Finally, we note that the CO, in the NOF, specifically instructed the Employer to indicate the dates of his contact with the applicants (AF 61). However, the Employer, without explanation, did not provide the requested information. An employer's failure to provide relevant and reasonably obtainable information requested by the CO is ground for the denial of certification, especially where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991); *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988). Thus, based on the Employer's failure to provide any proof of his contact with the applicants and the contradictory accounts of his contact by each of the four applicants, we give greater weight to the applicants' statements.

We emphasize that the Employer has the burden of proving that he engaged in a good-faith recruitment effort. Based on the foregoing, we find that the Employer has fallen short of meeting this burden. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.